

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARY L. SUTHERLAND,	§	
	§	No. 222, 2006
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Kent County
	§	I.D. No. 0505005126
Plaintiff Below,	§	
Appellee.	§	

Submitted: October 18, 2006

Decided: December 11, 2006

Revised: January 9, 2007

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 9th day of January, 2007, on consideration of the briefs and arguments of the parties, it appears to the Court that:

1) Mary Sutherland appeals her convictions, following a bench trial in the Court of Common Pleas, of two counts of second degree vehicular assault and driving under the influence. The Superior Court affirmed the convictions. In her appeal to this Court, Sutherland argues that the Superior Court erred in holding that: 1) there was probable cause to arrest her; 2) Sutherland's post-*Miranda*¹ statements were admissible; 3) there was sufficient evidence to support a finding that she was driving

¹*Miranda v. Arizona*, 394 U.S. 436, 469 (1966).

negligently; and 4) the trial court acted within its discretion in refusing to suppress Sutherland's statement as a sanction for a discovery violation. We find no merit to these arguments and affirm.

2) On the evening of May 7, 2005, Veronica Hinton and her mother were driving northbound on Route 13 near Harrington, Delaware, when they were hit from behind. The car spun out of control and into a ditch. Both women suffered injuries, and neither was able to identify the driver of the other car. Patrolman Keith Shyers, of the Harrington Police Department, received a radio dispatch advising that there had been an accident and that a white Mercury had fled the scene and was traveling north. Shyers responded, and saw a white Mercury on the shoulder of Route 13 less than a mile north of the accident site.

3) Shyers noticed that the white Mercury had sustained significant front-end damage and that the air bags had deployed. He found Sutherland, the only occupant, sitting in the driver's seat. Shyers asked Sutherland what happened and whether she had hit anything. Sutherland responded that she had no idea. Shyers noticed a strong odor of alcohol and saw beer cans on the floor of the car. In addition, Sutherland's speech was slurred. Shyers then placed Sutherland in the back of his patrol car to await the arrival of the State Police.

4) Delaware State Police Trooper Steven R. Rindone arrived shortly thereafter, and continued the investigation. By questioning Sutherland, he learned that she had been driving the white Mercury and that she had been drinking from noon until 9:00 p.m. Rindone also noted that Sutherland's speech was slurred and her face was flushed. He had Sutherland perform several field sobriety tests, which she failed. Rindone then told Sutherland that he was taking her into custody and he transported her to the police station. At the station, Rindone advised Sutherland of her *Miranda* rights. Sutherland waived her rights and gave a videotaped statement in which she admitted that she had had six beers and two glasses of wine before the accident, and that she hit an unknown object in the middle of the road.

5) Sutherland first argues that Shyers lacked probable cause to arrest her for driving under the influence. We adopt the Superior Court's analysis rejecting this claim:

[A] police officer has probable cause to believe a defendant has violated 21 *Del. C.* § 4177 ... "when the officer possesses 'information which would warrant a reasonable man in believing that [such] a crime has been committed.'" A finding of probable cause does not require the police to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that the guilt is more likely than not. To establish probable cause, the police are only required to present facts which suggest, when *those facts* are viewed under the totality of circumstances, that there is a fair probability that the defendant has committed a crime. When Officer Shyers located the Defendant on the side of the road a half mile to three-quarters of a mile from the

accident scene, he noticed severe front end damage to her vehicle which matched the information he received regarding the accident, there was at least one can of beer in the car, the Defendant's speech was slurred, he detected an odor of alcohol on her, and she did not know what had caused the air bags to deploy.... "The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest."....In this case, the Trial Judge properly found that Officer Shyers had made sufficient observations of the vehicle and the Defendant to determine that, taken in total, probable cause existed.²

6) Next, Sutherland argues that the statement she gave after being given *Miranda* warnings should have been excluded because her rights had been violated during earlier questioning and the *Miranda* warnings did not eliminate the taint of the earlier questioning. We disagree. In *Missouri v. Seibert*,³ the United States Supreme Court held that a "midstream recitation of warnings after interrogation and unwarned confession [did] not effectively comply with *Miranda*'s constitutional requirement...."⁴ That case involved a "question-first" police protocol under which the police would bring a suspect to the station, intentionally omit giving *Miranda* warnings, interrogate the suspect until the suspect confessed, then give *Miranda* warnings and repeat the same questions to obtain a second confession that could be used in court.

²*Sutherland v. State*, 2006 WL 1680027, at *2 (Del. Super.) (Citations and footnotes omitted.).

³ 542 U.S. 600 (2004).

⁴*Id.* at 604.

The *Seibert* decision identified several factors to consider in deciding whether the second confession is admissible:

[A] series of ... facts ... bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.⁵

7) Applying the *Seibert* factors, we are satisfied that Sutherland's videotaped confession was voluntary. Initially Rindone asked only a few questions, at the scene, as part of his investigation into the accident and Sutherland's involvement. When he decided to arrest Sutherland, he drove her to the hospital for blood testing, and then to the station for processing and questioning. Before the station house interrogation, Sutherland was given her *Miranda* warnings, and she waived her rights. Thus, the timing and setting of the two interrogations was different; the initial questioning was more limited and cursory than the station house interrogation; there was a significant break in time between the two interrogations; and the second interrogation was not treated as a continuation of the first.

⁵*Id.* at 615.

8) We find the United States Supreme Court decision in *Oregon v. Elstad*⁶ to be the more analogous authority. In *Elstad*, police officers went to Elstad's home to arrest him for burglary. Elstad, who was 18 years old, was waiting in the living room with one officer while the other officer went into the kitchen with Elstad's mother to explain that they were there to arrest her son. The officer who was waiting with Elstad asked the defendant whether he knew why the police were there. After Elstad said that he heard there was a robbery at his friend's house, the officer said that the police believed Elstad was involved. Elstad said, "Yes, I was there." The officers took Elstad to the sheriff's office, where he was given his *Miranda* warnings, waived his rights, and confessed. The Court held that "a suspect who has once responded to unwarned yet *uncoercive* questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."⁷ Here, as in *Elstad*, Sutherland's initial questioning was brief and uncoercive. Accordingly, Sutherland's knowing and voluntary post-*Miranda* statement was admissible.

9) Sutherland's third argument is that there was insufficient evidence that she was driving negligently when she caused the accident. She says that the only evidence of negligence was the fact that there was a car accident. The record refutes this claim.

⁶ 470 U.S. 298 (1985).

⁷ *Id.* at 318 (Emphasis added.).

Sutherland admitted that she had been drinking, and that she may have fallen asleep while driving. She was sufficiently impaired from her drinking that, after the accident, she was unable to pass any of the field sobriety tests. In addition, she had no idea what she hit. If the reason she did not know what she hit was because she was asleep, there would be no question but that she was negligent. If she was awake at the time of the accident, the only explanation for her not knowing that she hit another car would be that she was not paying attention to the road. That scenario, likewise, would support a finding that she was negligent.

10) Finally, Sutherland argues that the trial court abused its discretion when it refused to suppress her videotaped statement as a sanction for the State's last minute disclosure of the statement. The trial court agreed that the State had violated its discovery obligations, but decided that the appropriate relief was to provide Sutherland time to review the tape. If Sutherland needed more time, the trial court was prepared to continue the trial. Sutherland says that a continuance was not an acceptable remedy because she was anxious to have the case resolved and was concerned about the impact of the pending charges on her continued employment.

11) Trial courts have "broad discretion" to determine the appropriate sanction for a discovery violation.⁸ Here, the prosecutor did not receive the videotape until the

⁸*DeJesus v. State*, 655 A.2d 1180,1207 (Del. 1995).

day before trial, and she advised Sutherland promptly upon receiving the tape. The trial court acted well within its discretion in refusing the more drastic remedy of suppressing the evidence in favor of relief that allowed Sutherland a full opportunity to review the tape and to prepare her defense with knowledge of its contents.⁹

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁹See: Court of Common Pleas Criminal Rule 16(d)(2).